Noble Metal Processing, Inc. *and* Fred Dowell. Case 7–CA–48054

March 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 25, 2005, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Noble Metal Processing, Inc., Warren, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. March 31, 2006

[1] The General Counsel has moved to strike the Respondent's exceptions on the ground that they do not comply with Sec. 102.46 of the Board's Rules and Regulations. We deny the motion because the Respondent's exceptions adequately set forth the findings and conclusions to which the Respondent has excepted.

[2] In adopting the judge's finding that the Respondent unlawfully issued a written warning to employee and union steward Fred Dowell, we find it unnecessary to rely on her discussion of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

We agree with the judge that Dowell was engaged in protected activity when, during a meeting between Quality Department Manager Charles Smith and quality department employees, he protested the unilateral nature of the Respondent's announced changes in the department. Further, balancing the four factors articulated in *Atlantic Steel Co.*, 245 NLRB 814 (1979), we agree with the judge that Dowell did not lose the protection of the Act based on his conduct during the meeting. (Dowell told other employees that they did not have to listen to Smith, and Dowell got up to leave the meeting before complying with Smith's instructions to return to his seat.) Although we find merit in the Respondent's contention that the judge erred in failing to weigh the absence of unlawful provocation—the fourth *Atlantic Steel* factor—as militating against continued protection, we find that this factor is clearly outweighed by the initial three factors.

We observe that the complaint did not challenge the facial validity of the Respondent's work rules.

Wilma B. Liebman, Member

Dennis P Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, concurring.

For the reasons set forth below, I agree with my colleagues that the Respondent violated Section 8(a)(3) by issuing employee Fred Dowell a written warning. In this regard, I agree with my colleagues that Dowell's conduct was protected and did not lose protection because of the manner in which he acted.

Facts

On January 14, 2005, Respondent convened a meeting of its quality department employees to discuss how the operations of a facility it had just purchased would be integrated with those of its quality control operations. During the meeting, Dowell, the chief Union steward, told Respondent's quality manager, Charles Smith, that the Respondent could not make the planned changes without bargaining. Dowell also told the seven to nine employees in attendance that they did not have to listen to Smith because the changes were unilateral. As Dowell then proceeded to leave the meeting, Smith issued several instructions that Dowell return to his seat; Dowell did so. Dowell was subsequently disciplined for his actions during the meeting.

Analysis

The judge found that Dowell's discipline was unlawful under a *Wright Line*[1] analysis, and alternatively, under the *Atlantic Steel*[2] four-part test. Although I agree that Dowell's discipline was unlawful, I find that *Wright Line* is inapplicable. Because it is undisputed that Dowell was disciplined solely for his conduct at the January 14 meeting, the appropriate analysis is whether the conduct for which he was disciplined was initially protected under the Act and, if so, whether he lost that protection at any point. See *Hahner, Foreman & Harness, Inc.*, 343 NLRB No. 133, slip op. at 3 fn. 8 (2004).[3] As the Board stated recently in *Stanford Hotel*, 344 NLRB No. 69, slip

[1] *Wright Line*, 251 NLRB 1083, 1088, fn. 11 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[2] *Atlantic Steel Co.*, 245 NLRB 814 (1979).

[3] If Dowell's conduct remained protected at all times, a violation will be found, but if the conduct's protected status was ultimately lost, no violation will be found. See, e.g., *Trus Joist MacMillan*, 341 NLRB 369 (2004).

op. at 1 (2005), "[w]hen an employee is [disciplined] for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act."

I agree with the judge and my colleagues that Dowell's conduct at the January 14 meeting was initially protected. Applying the four factors set forth in *Atlantic Steel*, I also agree that Dowell's conduct did not cost him the Act's protection. I do not, however, agree with all aspects of the judge's *Atlantic Steel* analysis.

Under *Atlantic Steel*, these four factors are analyzed: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practices. Addressing the first factor—the place of the discussion—I note that in addition to the judge's finding that Dowell's conduct did not take place in a work area and thus was not disruptive of the work process, his conduct occurred at an employee meeting called by the Respondent to announce impending changes in its quality department where Dowell worked. I find that this meeting was an appropriate forum where employees, like Dowell, reasonably could be expected to express their views regarding the announced changes that affected their conditions of work. Even though the Respondent did not expressly solicit employee views, the "Board has specifically rejected the contention . . . that an employee who protests a management decision at an employee meeting called to announce that decision is guilty of unprotected [conduct] if the employer did not first solicit the employee's views." *Cibao Meat Products*, 338 NLRB 934 (2003). Further, this was not a situation where Dowell made his comments in derogation of a management directive to remain quiet. Cf. *Eagle-Picher Industries*, 331 NLRB 169 (2000) (conduct unprotected where employee disregarded express directive to hold questions and comments to end of meeting).

As to the second *Atlantic Steel* factor—the subject matter of the discussion—I agree with the judge that Dowell's remarks related directly to a change in working conditions affecting not only Dowell, but the other seven to nine employees at the meeting. In making his remarks, Dowell, as the chief union steward, was protesting the Respondent's unilateral conduct which, he believed, was contrary to the existing collective-bargaining agreement as well as to the Act. Thus, like the employee in *Stanford Hotel*, Dowell's "conduct occurred in the context of his attempted assertion of a fundamental right under the Act," here, the right to bargain, and "weighs strongly in favor of a finding that [his] remarks were protected." 344 NLRB No. 69, slip op. at 2.

As to the third *Atlantic Steel* factor—the nature of Dowell's behavior at the meeting—I am troubled by his attempt to leave the meeting and by his statement to employees that they did not have to listen to Smith because his announced changes were unilateral and illegal. However, I ultimately conclude that this conduct was not so egregious as to warrant forfeiture of the Act's protection. Thus, with respect to Dowell's attempt to leave the meeting, I find significant the fact that he did not encourage other employees to follow him and he did not exit the meeting room. To the contrary, when he was instructed to sit down, he ultimately did so. I also note that the Respondent apparently did not view Dowell as insubordinate by trying to leave the meeting. Although the Respondent argues in its exceptions that he was, the actual disciplinary warning issued to Dowell does not cite him for insubordination, even though the Respondent had a work rule specifically addressing insubordination.

As for Dowell's statement to employees during the meeting, it must be considered in context. As chief steward, Dowell was acting as the employees' bargaining representative during the meeting. It was in this capacity that he stated that employees did not have to listen to Smith, and he carefully linked this advice to his view that the unilateral changes announced by Smith were contrary to the Respondent's duty to bargain. Further, by returning to his seat, he stayed to listen to Smith, and the other employees followed his lead. In a similar context, where an employee representative "challenged management" about certain planned actions that he considered unlawful, and "acted purposefully and emphatically towards management" in challenging its plans, the Board found the employee's actions protected, notwithstanding that his conduct may have been accompanied by "disrespectful, angry and shocking outbursts" directed at the respondent's president. See *Lana Blackwell Trucking*, 342 NLRB No. 110, slip op. at 4 (2004). Here, I do not consider Dowell's statements as offensive as those in *Lana Blackwell*. Nor did Respondent appear, at the time Dowell made his statement, as offended as it now claims it was. The warning issued Dowell makes no mention of his acting improperly by telling employees that they did not have to listen to Smith.

As to the fourth *Atlantic Steel* factor—whether Dowell's conduct was provoked by the Respondent's unfair labor practices—the judge found that this factor "cannot be applied" because there was no evidence that the Respondent committed any concurrent unfair labor practices during the meeting that provoked Dowell's comments and conduct. Concededly, Dowell was not

"responding to unlawful or provocative behavior by the Respondent," and this weighs against a finding that his conduct was protected. See *American Steel Erectors, Inc.*, 339 NLRB 1315, 1317 (2003). However, this is the only factor that I find favors a finding that Dowell's conduct was not protected.

In sum, although I do not condone Dowell's behavior at the January 14 meeting, I cannot conclude, under the four-factor test of *Atlantic Steel,* that it was so egregious as to cost him the protection of the Act. Accordingly, I concur in the finding that the warning issued to him for his actions at this meeting violated Section 8(a)(3).

Dated, Washington, D.C. March 31, 2006

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

Darlene Haas Awada, Esq., for the General Counsel.
James D. Cockrum, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Detroit, Michigan on July 5, 2005. The original charge was filed by Fred Dowell, an individual, herein Dowell on November 2, 2004.[6] On January 27, 2005, an amended charge was filed. On May 26, 2005, the Regional Director for Region 7 of the National Labor Relations Board, herein the Board, issued a Complaint and Notice of Hearing. The complaint alleges that on or about January 18, 2005, Noble Metal Processing, Inc., herein Respondent, issued a written verbal warning to Dowell because he engaged in protected concerted activities by contesting changes in employee terms and conditions of employment at an employee meeting with Respondent. The complaint further alleges that Dowell protested the changes in his representative function as a union steward. Respondent filed a timely answer to the complaint denying the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and by Counsel for Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Warren, Michigan, has been engaged in the laser welding of metallic materials and non-retail sale of laser welded flat blanks and laser welded tubular products to various automobile manufactures. Annually, Respondent derives gross revenues in excess of $500,000 and purchases and receives at its Warren, Michigan, facility goods valued in excess of $50,000 directly from points outside the State of Michigan. Respondent] admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 155, International Union, United Automobile, Aerospace and Agricultural Implement Workers of American (UAW), AFL-CIO, herein the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. Background

Fred Dowell, who is classified as a quality technician,[7] began working for Respondent in September 1998. In approximately 1999, the Union became the collective bargaining representative for all full-time production employees, Manufacturing Engineering Technicians, Quality Technicians, and Die Setters employed at the Warren, Michigan facility. On January 26, 2004, the Union and Respondent entered into a collective bargaining agreement with an expiration date of December 15, 2009. The agreement provides for annual automatic renewal in the absence of either party's timely notice to terminate, modify or make changes. Currently, there are three designated union stewards and three alternate stewards. Dowell is not only the chief steward, but also the designated steward for the first shift. The other two stewards work the second and third shifts respectively. Dowell is supervised by Quality Supervisor Neil Anderson and Anderson is supervised by Quality Manager Charles Smith.

On January 13, 2005, Dowell filed two grievances with Respondent's Human Resource Manager Michelle Verkerke. In grievance number 40, Dowell alleged that Respondent made "non-negotiated unilateral changes" in the Quality Department. The grievance further accused Respondent of creating a hostile work environment and of disparately treating employees in Quality Control. Grievance number 38 alleged that Respondent bumped employee Latris Brown from first shift to second shift in violation of the collective bargaining agreement. In the grievance, Dowell further alleged that Respondent had shown favoritism to white employees with less seniority.

Dowell testified that during the most recent collective bargaining negotiations, Respondent informed the Union of its plans to purchase a facility identified as Prototube and discussed with the Union how the Prototube employees would fit into the existing bargaining unit. Dowell estimated that approximately eight or nine of the Prototube employees became Union members and two of the new employees perform quality work. Quality Manager Charles Smith testified that when Respondent initially purchased the Prototube Division in 2004, the new division operated outside Respondent's quality system. Respondent determined in January 2005, however, that the Prototube Division would "roll" into Respondent's quality system. It was anticipated that as a result of the "roll up," there would be a new welding system requiring inspections and there would be a new door for the additional box trucks bringing in

[6] All dates are in 2005 unless otherwise indicated.

[7] Quality inspectors or technicians take measurements of parts produced and document the results.

the smaller quantities for the Prototube inspections. Quality supervisor Neil Anderson testified that with the acquisition of the Prototube work, additional products required inspection.

2. The January 14 Meeting

On January 14, 2005, Quality Manager Charles Smith held a meeting with Quality Department employees. Smith testified that the purpose of the meeting was to lay out the changes in the department that were the result of Respondent's taking on the Prototube Division. Smith testified that he was unaware of any discussions with Dowell concerning these changes prior to January 14. Smith testified that the intent of the meeting was to lay out the different changes and the responsibilities for each of the employees.

Dowell estimated that approximately seven to nine employees attended the meeting and sat around a conference table.[8] Dowell recalled that as Smith discussed the proposed changes, employee Leslie Carter asked him (Dowell) if Smith could make the anticipated changes. Dowell told Carter that Smith was not supposed to make unilateral changes without bargaining. It is undisputed that Dowell's comment initiated a dialogue between Smith and Dowell. Smith recited the management right's clause of the collective bargaining agreement and Dowell in turn recited the recognition clause of the agreement. Dowell explained that after an interchange back and forth with Smith, he became frustrated and walked to the door. He told Smith that he had better things to do. Dowell testified that at that point of the conversation, Smith told him that he resented Dowell's calling him prejudiced. Dowell recalled that he returned to the table and told Smith that while he had not called Smith prejudiced, this was the opinion of the people in their department.[9] Dowell recalled that he then sat down at the table and Smith finished telling the employees about the changes. Dowell denied that he ever called Smith a racist during the meeting. Dowell also denied instructing employees not to listen to Smith.

Smith testified that during the meeting, Dowell stood up and proceeded to walk out of the room stating that he "didn't have time for this." As he walked toward the door, he also told the employees that they didn't have to listen to Smith. Smith recalled that he told Dowell: "he did have time for this because we weren't doing any incoming inspection." Smith maintained that he told Dowell that there were important things they needed to cover and for him to sit down. Smith testified that he and Dowell continued to discuss whether there had been a viable change and that Dowell stated that the action in question was another reference to Smith's prejudice. Smith recalled that he told Dowell that he didn't like being referred to as prejudiced and that it hurt his feelings. Smith asserted that Dowell responded that he didn't care how it made Smith feel and he again tried to leave the meeting. Smith recalled that he told Dowell that he could not leave because they needed to discuss what was going to happen with the job. Smith testified that at that point Dowell again sat down and the meeting continued. Smith estimated that during his two minute discussion with Dowell, he told Dowell to sit down approximately three times.

Leslie Carter testified that during the meeting, Smith explained how the additional Prototube work would be incorporated into the bargaining unit's work. Carter recalled that he looked at Dowell and asked him if Respondent could make the discussed changes. Although Dowell replied that Respondent could not do so, Smith countered by saying that Respondent could do so. Carter acknowledged that while both Smith and Dowell raised their voices during the discussion, Dowell did not use any profanity. Carter also recalled that Dowell walked toward the door during the meeting and Smith directed him back to his seat. Carter denied that Dowell had at any time called Smith or anyone else a racist during the meeting. Carter further denied hearing anyone use the word "prejudiced" during the meeting.

Anderson testified that while Smith was explaining the changes to employees, Dowell stood and began to disagree with Smith. Dowell stated that Smith could not make the proposed changes without bargaining with the Union. Anderson recalled that Dowell told the employees that they didn't have to listen to Smith because the changes were unilateral and illegal. Anderson testified that Dowell told Smith that the actions in issue were an example of Smith making changes because he was prejudiced. Smith told Dowell that he took great offense and he did not like Dowell's accusing him of being prejudiced. Anderson recalled that Dowell used the word "prejudiced" approximately three or four times. Anderson also recalled that Smith told Dowell to sit down approximately three of four times.

3. Events Following the Meeting

On January 18, 2005, Dowell filed a grievance to protest "the unilateral non-negotiated demotions, reclassification, and wage reduction" on behalf of two Quality Department employees. In his grievance, Dowell asserted that Respondent took such action while maintaining a less senior person in the department. Dowell also alleged that in taking such action, Respondent violated the collective bargaining agreement and showed racial preference.

On January 19, Dowell and the third-shift steward met with Smith at approximately 7:30 a.m. Smith presented Dowell with a counseling form for a verbal correction. In the written description of the occurrence upon which the discipline was based, Smith described Dowell as disorderly, antagonistic, and disrespectful. Smith added that Dowell raised his voice and told employees that he (Smith) was not able to make the changes in issue. Smith added that Dowell told employees that "this was an example" of Smith's being prejudiced. Smith also included in the disciplinary notice that Dowell started to leave the room, stating that he had more important things to do. The verbal correction identifies Dowell's conduct as violative of subsections 19 and 30 of Section 3.9 of the Employee Rules of Conduct.[10]

[8] The only individuals testifying about the meeting were employees Dowell and Leslie Carter and supervisors Smith and Anderson.

[9] On direct examination, Dowell testified that Smith used the word "racist" and on cross-examination, Dowell testified that Smith used the word "prejudiced."

[10] Section 3.9 Unacceptable Activities provides a listing of conduct for which violations may result in discipline including immediate dismissal without warning. Subsection is identified as "Obscene or abu-

Smith testified that prior to January 14, he and Dowell had discussed Respondent's right to make changes to work processes. He recalled one prior discussion with Dowell in which they discussed whether Respondent could reduce the number of quality technicians under the management right's provision of the collective bargaining agreement. Smith asserted that while he and Dowell had prior discussions about management rights, he had never disciplined Dowell for his conduct during the prior discussions. He explained that the difference between the prior discussions with Dowell and the discussion with Dowell on January 14 was Dowell's tone of voice. Respondent's counsel asked Smith what he perceived to be different about Dowell's behavior in the January 14 meeting that resulted in his getting a discipline when prior discussions had not resulted in discipline. In response, Smith identified not only Dowell's tone of voice, but also the level of volume and Dowell's stance. While Smith acknowledged that he raised his voice with Dowell during the meeting, he asserted that he did so because Dowell raised his voice. Smith testified that he was trying to regain control of his meeting.

III. ANALYSIS AND CONCLUSIONS

1. Whether Respondent Unlawfully Disciplined Dowell

The complaint alleges that Respondent issued a written verbal warning to Dowell because he engaged in protected concerted activities by contesting changes in employee terms and conditions of employment at an employee meeting with Respondent and thereby also engaging in his representative function as union steward. Because Respondent's motivation is a critical element in determining the lawfulness of Dowell's discipline, a *Wright Line*[11] analysis must be used. In *Wright Line*, the Board set out the causation test that it would employ in all cases alleging violations of 8(a)(3). The analysis is based upon the principle that an employer's unlawful motivation must be established as a precedent to finding an 8(a)(3) violation. *American Gardens Management Co*., 338 NLRB No. 76, slip op. at 2 (2002). Under this analysis, the General Counsel must make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." To meet this initial burden, General Counsel must first show the existence of activity protected by the Act. Secondly, General Counsel must prove that the employer knew that the employee had engaged in such protected activity. Thirdly, the General Counsel must demonstrate that the alleged discriminatee suffered some adverse employment action. Finally, General Counsel must also establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *Shearer's Foods, Inc.*, 340 NLRB No. 132, slip op. at fn. 4 (2003).

Respondent asserts that Dowell's discipline was merited because he engaged in conduct that was unacceptable under the existing employee work rules. Specifically Dowell received the verbal correction because it was determined that he engaged in disorderly, antagonistic, and disrespectful conduct on company premises. Additionally, he is charged with disturbing or otherwise interfering with associates or supervision in violation of the work rules. Respondent maintains that Dowell received the discipline because of his insubordinate behavior and that Dowell has attempted to "hide behind the claim of 'protected conduct' to avoid discipline." Counsel for the General Counsel maintains that Dowell was disciplined because he spoke out during the January 14 meeting and protested what he and other employees believed to be Respondent's unilateral changes and racial discrimination. Counsel for the General Counsel asserts that Dowell engaged in protected concerted activity as well as having acted in a representative capacity while challenging Respondent's proposed changes. Counsel for the General Counsel also submits that Dowell did nothing to lose the protection of the Act when he engaged in this protected concerted and union activity.

a. Whether Dowell's Conduct Lost the Protection of the Act

In *NLRB v. Thor Power Tool*,[12] the Seventh Circuit analyzed the issue of balancing an employee's right to engage in protected activity and an employer's right to maintain order in the workplace. The Court noted: "Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not to be disturbed." In addressing this balance of interests, the Board has noted: "A line exists beyond which an employee may not with impunity go, but that line must be drawn "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in 'a moment of animal exuberance'" Respondent maintains that Dowell's conduct on January 14 exceeds lawful conduct and is beyond the protection of the Act. I find, however, that neither the record evidence nor the prevailing Board authority supports this conclusion.

The Board has repeatedly held that strong, profane and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity. *Max Factor & Co*., 239 NLRB 804, 818 (1978); *United States Postal Service*, 250 NLRB 4 (1980). See also *Thor Power Tool Company*, *supra*, where a member of the union grievance committee lost his temper during a grievance discussion and called the plant superintendent a "horse's ass." The conduct, however, was not found to be so egregious that the committee person lost the protection of the Act. In *Consumer Power Co*., 282 NLRB 130, 132 (1986), the Board held that when an employee is disciplined for conduct that is part of the "*res gestae* of protected concerted activities," the relevant question is "whether the conduct is so egregious as to take it outside the protection of the

sive language toward any manager, associate or customer; indifference or rudeness toward a customer or fellow associate; any disorderly, antagonistic, disrespectful conduct on company premises." The conduct that is identified in Subsection 30 includes: "Threatening, intimidating, coercing, disturbing or otherwise interfering with associates or supervision."

[11] *Wright Line, a Division of Wright Line, Inc*., 251 NLRB 1083, 1088, fn. 11 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[12] 351 F.2d 584, 587 (7th Cir. 1965).

Act, or of such a character as to render the employee unfit for further services."

In *Atlantic Steel Co*., 245 NLRB 814 (1979), the Board articulated the factors to be balanced in determining whether an employee's concerted protected activity loses the protection of the Act due to opprobrious conduct. The factors are (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by unfair labor practices. Applying these factors, it appears that Dowell's conduct was not so opprobrious as to merit the loss of the Act's protection.

While Dowell protested Respondent's alleged unilateral changes in his January 13 grievances and at the January 14 meeting, there is no complaint allegation that Respondent implemented unilateral changes or engaged in any other violation of Section 8(a)(5) of the Act. Additionally, there is no allegation that Respondent engaged in any independent 8(a)(1) violation through statements or conduct. Accordingly, there is no evidence that Dowell's comments and conduct were provoked by unfair labor practices and thus *Atlantic Steel Co.*'s fourth factor cannot be applied. The application of the remaining three factors, however, reflects that Dowell did not lose the protection of the Act.

Citing *Overnight Transportation Co*., 343 NLRB No. 134, slip op at 10 (2004), Respondent argues that public displays of insubordination weigh against the protection of the Act because they are more likely to disrupt work activities. While Dowell's statements and behavior occurred in the presence of other employees, such conduct did not occur while employees' were in their work area and it is not alleged to have disrupted the work process. Additionally, while Dowell challenged Respondent's right to make the proposed changes, I don't find that his behavior constituted a "public undermining" of Smith's authority.[13]

Clearly, the subject matter of the discussion was protected activity. By his comments, Dowell protested changes in the work process that he believed to be contrary to the collective bargaining agreement. There is no dispute that on the day prior to the meeting, Dowell and other employees began the circulation of a petition to protest the "non-negotiated unilateral changes" which they believed to have been implemented by Respondent. While there is dispute within the record as to whether Dowell referenced Smith as a "racist" or as "prejudiced," the issue of Respondent's racial discrimination was woven into Smith's and Dowell's discussion. Both Dowell and Carter testified that this was an issue that employees presented to Dowell to address in his role as union representative. The day prior to the meeting, Dowell filed two grievances that referenced Respondent's alleged racial preference and "showing racial favoritism toward white workers with less seniority."

Respondent asserts that the changes in the work process were not unilateral changes subject to bargaining and that allegations of racial favoritism were without basis. I note however, that the protected nature of Dowell's complaints does not turn on their merits. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984). Additionally, protection of the Act is not denied to an employee "regardless of the inaccuracy or lack of merit of the employee's statements absent deliberate falsity or maliciousness, even where the language used is stinging and harsh." *Guardian Industries*, 319 NLRB 542, 549 (1995). As Counsel for the General Counsel submits in her brief, there is no evidence that Dowell was deliberately false or malicious in his statements. His comments about Smith's racial prejudice appear to be based upon his and other employee's concerns. His interpretation of the collective bargaining agreement appeared to be the basis for his asserting that Respondent had unlawfully implemented unilateral changes.

Respondent asserts that it was the nature of Dowell's outbursts or behavior that differed from his conduct in previous discussions with management. Smith asserts that it was the tone and volume of Dowell's voice as well as his "stance" that distinguished the discussion on January 14 from their other discussions about management rights. Smith and Anderson testified that Smith told Dowell to return to his seat approximately three or four times. Dowell and Carter testified that Smith told Dowell to return to his seat only one. While Dowell admits that he threatened to leave the meeting, he did not do so. There is no allegation that he used any profanity or that he made any threats toward Smith or any other management official.

The overall record does not demonstrate that Dowell's conduct on January 14 was so egregious as to be considered indefensible. As noted above, the Board has allowed a degree of latitude in circumstances where employees are engaged in allegedly inappropriate, yet protected activities.[14] In its recent decision in *Union Carbide Corporation*,[15] the Board affirmed the administrative law judge in finding that an employee's conduct in raising a collective bargaining issue did not take him outside the protection of the Act. While the Board noted that the employee's behavior was rude and disrespectful in calling his supervisor a "fucking liar," his conduct was not so "out of line" as to remove him from the protection of the Act. In *Severance Tool Industries, Inc*., 301 NLRB 1166, 1170 (1991), a union bargaining committeeman called the employer's president a son-of-a-bitch and threatened to discredit the president's personal reputation as he protested a vacation pay issue. Affirmed by the Board, the administrative law judge found that despite the employer's contentions that the conduct was insubordinate, disrespectful, and belligerent, the conduct was nonetheless protected concerted activity and protected by Section 7 of the Act.

In his brief Counsel for Respondent cites a number of cases where the Board has found an employee's conduct sufficiently egregious as to remove the employee from the protection of the Act. In *Caterpillar Tractor Co*., 276 NLRB 1323, 1326 (1985),

[13] Ibid.

[14] See *Syn-Tech Window Systems*, 294 NLRB 791 (1989) in which a union steward's pointing his finger angrily at respondent's representative and threatening him with an unspecified "problem" if employees' grievances were not remedied was not found sufficiently egregious to remove the protections of the Act. See also *Lana Blackwell Trucking*, 342 NLRB No. 110, slip op. at 7 (2004) where an employee's "disrespectful, angry, and shocking outbursts" toward the manager and president occurred in the context of concerted activities and did remove the employee from the protection of the Act.

[15] 331 NLRB 356 (2000).

the Board found that a union steward's conduct was malicious, defamatory, insubordinate, obnoxious, wholly unjustified, and outside the protection of the Act. The steward's conduct involved his publishing and disseminating throughout the plant a cartoon with accompanying profanity. The cartoon depicted a supervisor as a razorback pig with grotesque features urinating on a stick figure that was labeled "common law-life worker." In *Honda of America Manufacturing*, 334 NLRB 751, 752 (2001), the employee utilized a written publication to launch a person attack on management, insinuating that they were untruthful, unethical, and disparaging their intelligence and competence. Respondent has also pointed out that there are other cases when an employee engages in profane and vulgar attacks on a supervisor, the employee loses the protection of Section 7 of the Act.[16] The record reflects, however, that while Dowell challenged Smith in front of other employees, his conduct did not involve the use of profanity or vulgarity and did not constitute a malicious attack on Smith or any other management official. Consequently, I do not find that Dowell's conduct on January 14 removed him from the protection of the Act.[17]

b. Whether General Counsel and Respondent have Met their Burdens under Wright Line

Accordingly, having found that Dowell's conduct did not lose the protection of the act, I must then determine whether Counsel for the General Counsel has met the initial burden of establishing a *prima facie* case. As discussed above, I find that Dowell's statements and conduct during the January 14 meeting were also within his role as union representative. Crediting Dowell and Carter, it appears that the discussion began with Carter's asking Dowell if Respondent could make the proposed changes. Dowell's protests and assertions to Smith involved what Dowell and other employees perceived to be Respondent's unlawful unilateral changes. The discussion with Smith also involved the issue of whether Respondent was favoring white employees and demonstrating racial preference. While Respondent asserts that Dowell and other employees were in error in these allegations, there is no question that such matters clearly related to terms and conditions of employment. Thus, regardless of whether Respondent was engaging in the alleged conduct and regardless of the accuracy of Dowell's personal opinions, Dowell's actions were squarely within the parameters of protected concerted activity.[18] Thus, Counsel for the General Counsel has established that Dowell was engaged in protected activity that was known to Respondent and that he received a written verbal warning.

The remaining element for the *Wright Line* burden of proof imposed on the General Counsel may be sustained even where there is no direct evidence of motivation and there is inferential evidence arising from the circumstances. Additionally, it may be found that where an employer's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, a trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The Board has found that under certain circumstances animus will be inferred in the absence of direct evidence and such a finding may be inferred from the record as a whole. *Fluor Daniel, Inc*., 304 NLRB 970 (1991). Motivation of animus may also be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such an inference. *Union Tribune Co. v. NLRB*, 1 F.3d 486, 490-491 (7th Cir. 1993); *Data System Corp*., 305 NLRB 219 (1991). In the instant case, Respondent's basis for disciplining Dowell appears implausible. Respondent does not deny that on the day prior to the meeting, Dowell filed two grievances alleging that Respondent made unilateral changes and engaged in racial discrimination. The overall record indicates that when Dowell again raised these concerns in Smith's scheduled meeting, Respondent retaliated by issuing a written verbal warning. Smith admits that he and Dowell had prior discussions about management rights and Dowell was not disciplined for expressing his opinion. Smith relies upon Dowell's tone of voice, volume level of voice, and stance as the factors that set apart the Dowell's conduct on January 14 as compared to previous discussions. Smith acknowledges, however, that both he and Dowell raised their voices during the discussion. Accordingly, the timing of the discipline as well as Respondent's implausible explanation for the discipline warrants an inference of animus sufficient to establish the requisite motivational link. Counsel for the General Counsel also submits that the written verbal warning provides direct evidence of Respondent's unlawful motivation, citing the explicit language in the discipline. I note that the written verbal correction referenced Dowell's statements to Smith that he could not make the changes to the jobs,

[16] See *North American Refractories*, 331 NLRB 1640, 1642 (2000), where an employee referred to his supervisor as "a stupid motherfucker" and a "dumb asshole" and *Foodtown Supermarkets, Inc*., 268 NLRB 630 (1984) where the employee repeatedly called his supervisor a "son-of-a-bitch."

[17] For the most part, Dowell and Carter's description of the events on January 14 correlate to the description given by Anderson and Smith. One distinction involves whether Smith told Dowell to sit down one time or as many as three or four times. Both Anderson and Smith testified that Dowell told employees that they did not have to listen to Smith. Anderson testified that Dowell told employees that they did not have to listen to Smith because what he was telling them was illegal. Dowell denied instructing employees not to listen to Smith. While Carter testified concerning the exchange between Smith and Dowell, he did not confirm nor deny that Dowell instructed employees as asserted by Smith and Anderson. Dowell contends that Smith only told him to sit down once and he did so. Dowell acknowledges, however, that the entire interchange with Smith lasted as long as 10 or 15 minutes. Based upon the total evidence, I credit Smith and Anderson and find that it is more likely that their recall is more accurate than Dowell's with respect to certain aspects of this discussion. I find that it is more likely that Dowell may have told employees that they did not have to listen to Smith and that Dowell may have been told more than once to return to his seat. Even if I credit the testimony of Smith and Anderson with respect to Dowell's alleged statement to employees and with respect to the number of times that Smith asked Dowell to return to his seat, I do not find the alleged conduct sufficiently egregious to remove Dowell from the protection of the Act.

[18] See *NLRB v. City Disposal System*, 465 U.S. 822, 835 (1984), where the Court noted that the protection of the Act is not lost when a single employee, acting alone, participates in an integral aspect of collective bargaining.

but must "bargain for each and every change." Thus, based upon direct and inferential evidence, General Counsel has made a *prima facie* showing sufficient to support the inference that Dowell's protected activity was a motivating factor in Respondent's decision to discipline Dowell.

Under *Wright Line*, the burden now shifts to Respondent to demonstrate that the same action would have taken place even in the absence of the protected activity. *American Gardens Management Co.*, 338 NLRB No. 76, slip op. at 2 (2002). Prior to the trial in this matter, Counsel for the General Counsel subpoenaed from Respondent the personnel records to show the issuance of verbal counseling to employees for insubordination or for a violation of Employee Rule 3.9, number 19 for the period from January 1, 2004 through the date of the trial. Human Resources Manager Michelle Verkerke testified that there were no records to show the issuance of verbal counseling discipline that comport to the parameters set out by Counsel for the General Counsel's subpoena.[19] Other than a reference to a recent suspension, Respondent provided no records to show that any other employees had engaged in conduct similar to Dowell or had been similarly disciplined for such conduct.

Respondent asserts that Dowell's conduct is particularly egregious because of his duty to "work now, grieve later." Respondent contends that as a steward, Dowell was aware of the industrial norm requiring an employee to "work now and grieve later." Counsel for Respondent submits that Dowell chose to disrupt the meeting and interfere with the management of the company rather than utilize the grievance process. The record reflects, however, that prior to the meeting and subsequent to the meeting, Dowell filed grievances with respect to these concerns. As pointed out by Counsel for the General Counsel, the Board has previously noted "Whether the protested working condition was actually as objectionable as the employee believed it to be or whether the objection could have been pressed in a more efficacious or reasonable manner is irrelevant to whether their concerted activity is protected by the Act. *Tamara Foods*, 258 NLRB 1307, 1308 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982), *cert. denied* 461 U.S. 928 (1983).

Based upon the total record evidence, I find that Respondent has not met its burden of demonstrating that it would have disciplined Dowell absent his union and protected activity, and that his discipline was substantially motivated by union and protected activity in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Noble Metal Processing, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 155, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing a written verbal warning to Fred Dowell on January 19, 2005 Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily disciplined Fred Dowell, it must rescind the January 19, 2005 discipline and notify him in writing that it has done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[20]

ORDER

The Respondent, Noble Metal Processing, Inc., Warren, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Disciplining employees because they engage in protected concerted activities and because of their activities as a union representative for other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline issued to Fred Dowell on January 19, 2005, and within 3 days thereafter notify Fred Dowell in writing that this has been done and that the discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its Warren, Michigan facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 2005.

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[19] Verkerke testified, however, than an employee had been suspended the prior week for insubordination.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 25, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline or otherwise discriminate against any of you for engaging in protected concerted activities or for your activities in support of Local 155, International Union, United automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Fred Dowell, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

NOBLE METAL PROCESSING, INC.